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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS SCOTT STONE,

Defendant and Appellant.

F051812

(Super. Ct. No. 05CM4433A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Peter M. Schultz, Judge.

Linnéa M. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

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Nicholas Scott Stone (appellant) was convicted by jury of one count of attempted murder with premeditation and deliberation (Pen. Code, §§ 664, 187, subd. (a))<sup>1</sup> and three counts of attempting to dissuade a witness (§ 136.1, subd. (a)(2)). A personal use of a firearm allegation (§ 12022.53, subd. (b)) was found true as to the attempted murder charge, as was an allegation that all counts were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)). The jury acquitted appellant of one count of possession of a weapon, i.e., a billy club (§ 12020, subd. (a)(1)). Pursuant to the trial court's instructions, when the jury found appellant guilty on count 1, it entered no verdict on count 2, which charged assault with a firearm as an alternative and lesser offense to the attempted murder charged in count 1.

The trial court sentenced appellant to an indeterminate prison term of 15 years to life on the attempted murder plus a determinate term of 10 years on the gang and firearm enhancements, and to three consecutive seven years to life terms on the convictions for attempting to dissuade witnesses with the gang enhancement.

On appeal, appellant argued that the trial court incorrectly instructed the jury on attempted murder, that the prosecutor misstated the law on that subject during argument, and that the evidence was insufficient to support his attempted murder conviction. We originally agreed with appellant and reversed the murder conviction, along with the gun use enhancement and gang allegation attached to that count. The People petitioned for review. The California Supreme Court thereafter issued its opinion in *People v. Stone* (2009) 46 Cal.4th 131 (*Stone II*), reversed the judgment of this court, and remanded the matter to us for further proceedings consistent with its opinion. For the reasons that follow, and upon reconsideration, we will affirm the judgment in its entirety.

## FACTS

At approximately 8:30 p.m. on the evening of October 21, 2005, police officers Mark Pescatore, Jeffrey McCabe, and Sergeant Pat Jerrold were on duty at a parking lot

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<sup>1</sup>All further statutory references are to the Penal Code unless otherwise stated.

carnival when Officer Pescatore noticed a group of 10 to 25 youths blocking the pathways and moving about the carnival area. About half of those in the group were wearing red, a color associated with Norteno street gangs. It appeared to Officer McCabe that the group was “looking for trouble.” Sixteen-year-old Joel F., as well as Gerardo A. and “Jamal” were included in the group. Both Gerardo and Jamal were members of a Norteno street gang.

Sixteen-year-old Camilo M. also was at the carnival, with his friend Abel Rincon. Camilo was a member of a Sureno street gang. Seeing them there, several members of the Norteno gang called Camilo “scrapa,” a derogatory term for a Sureno, and challenged Camilo and Rincon to a fight. When Camilo and Rincon decided not to fight and to leave the carnival, a group of Nortenos followed them into the parking lot. Jamal kicked Rincon’s truck as Camilo and Rincon drove away.

Camilo and Rincon went back home, contacted several people including appellant, and told them what had occurred at the carnival. Camilo and appellant were “good friends.” About a half-hour to an hour after the original encounter at the carnival, Camilo and Rincon, along with Julio L., Roselynn M., Pedro Gomez, and appellant, returned to the carnival in Rincon’s truck. Camilo and the others armed themselves with “metal pipes,” because “[the Nortenos] hit the truck.” Rincon drove, while Gomez sat in the center and appellant on the passenger side of the front seat. The others sat in the bed of the truck.

Meanwhile, at the carnival, the officers directed the Norteno group to leave, and about 10 of them went to a grassy area in the parking lot. When Rincon and his companions arrived back at the carnival, he drove his truck past the group of Nortenos, and the two groups “mad dogged” each other. Rincon drove past the Nortenos twice and, on the third time, stopped the truck 10 to 15 feet from the group. While Rincon held up three fingers, denoting a gang sign, appellant rolled down his window and was “throwing fingers out and he said 13.” Appellant then pulled out a handgun, which he fired “immediately,” and the truck left the scene.

Joel F., who was named as the attempted murder victim in count 1, testified for the prosecution at trial. On direct examination, Joel described the position of the gun in appellant's hand as "pointed up" "slightly" and extended toward the group when he fired. Joel did not think appellant had pointed the gun at anyone in particular, but he acknowledged that when the gun fired, he "ducked behind the car" because he was worried about being shot. The group "scattered" and "[e]veryone kind of ducked." Joel was "more to the back" of the truck at the time of the shooting.

On cross-examination, when defense counsel asked Joel if the weapon had been pointed at him, he said, "not directly," but it was "near me." When reminded that he had been near the back of the truck at the time, Joel stated the gun "was pointing behind," and even if he was at the back of the truck, "[t]hat's still near me."

On redirect, the prosecutor asked Joel whether he remembered telling an officer at the scene that the gun was pointed over their heads but low enough that someone could have been shot. Joel replied, "Just to scare us. I don't really think he was trying to shoot anybody."

Officer Pescatore, who was 60 feet from the truck at the time, observed "an arm come out of the passenger window, and then saw a muzzle flash and heard a gunshot." He described the arm as "pointing straight out the window" at the group of individuals on the grassy island of the parking lot, about four to five feet away.

Officer McCabe, who was standing by Officer Pescatore, also heard the gunshot, and the two followed the truck—McCabe on foot and Pescatore in his patrol car—as it headed out of the parking area. Pescatore soon stopped the truck and ordered the six occupants out of the truck one at a time. As appellant backed toward the officer, he whispered to Roselynn, Camilo, and Julio, "If one of you guys rat on me like I'll make sure when I get out I'll kill you guys. If not, I'll send someone to kill you."

Investigator Steven Rossi testified that he spoke to Joel F. in the parking lot after the incident and then took him to the police station. Joel was not able to identify appellant as the shooter, but he told Rossi an hour or so after the shooting that "he just

got shot at and he was scared, and that's why he ducked behind the car because he feared for his life, that he was going to get shot." Rossi described Joel as visibly shaken.

### DISCUSSION

Appellant was charged with the attempted murder of Joel F., one of the people in the crowd he shot at. On appeal, appellant argued that the trial court incorrectly instructed on attempted murder by giving a "kill zone" instruction; that the prosecutor misstated the law on that subject during argument, exacerbating the erroneous instruction; and that the evidence was insufficient to support the attempted murder conviction. We agreed and reversed, finding prejudicial instructional error and insufficient evidence that appellant specifically intended to kill Joel F. The Supreme Court agreed with our conclusions that the kill zone instruction was given in error and, implicitly, that the evidence did not demonstrate a specific intent to kill Joel F. The court also held, however, that a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind. (*Stone II, supra*, 46 Cal.4th at p. 140.) It suggested that this is the theory upon which appellant was tried and that it is what the evidence showed.

The court remanded the case to us because both of our conclusions—that error in instructing on the kill zone theory, combined with the prosecutor's argument, was prejudicial, and that insufficient evidence supported the attempted murder conviction—may have been based, at least in part, on the understanding that attempted murder required the intent to kill a particular person. (*Stone II, supra*, 46 Cal.4th at p. 139.) The court acknowledged that, in hindsight, it would have been better had the case been charged differently. (*Id.* at p. 141.) In its remand, the court stated:

"The Court of Appeal should reconsider the issues of this case in light of the views expressed in this opinion. In doing so, the court should consider any issues regarding the variance between the information—alleging [appellant] intended to kill Joel F.—and the proof at trial—[appellant] intended to kill someone although not specifically Joel F. (See ... § 956.)" (*Stone II, supra*, at p. 142.)

## 1. Theory for Attempted Murder Conviction

On remand, appellant argues that the record is inadequate to determine whether the jury found him guilty of attempted murder on a legally supportable theory. As argued by appellant, he was tried on two theories: (1) the specific intent to kill Joel F., which was not supported by sufficient evidence; and (2) the kill zone theory, which was both legally and factually inapposite. Appellant claims he was not tried on a pleading or theory “that he specifically intended to kill one member of a group of persons gathered together in [a] parking lot ... on October 21, 2005.” “[T]his court cannot,” he claims, “determine whether appellant was convicted on this theory, or on one of the other two [unsupported] theories.” We disagree.

First, we disagree with the proposition that appellant was tried on the theory that he specifically intended to kill Joel F. While the information did name Joel F. as the victim of the attempted murder, this theory was not pursued by the prosecutor at trial. In his opening argument, the prosecutor noted that

“when [appellant] got that gun and went to the carnival, ... he wasn’t thinking [about] Joel F[.] ... hadn’t singled out Joel F[.] ... as an individual. He was looking for a group of that rival gang, a Norteno. [¶] ... [A]nd he went back with that gun to find one of them .... [¶] ... [¶] When [appellant] is shooting, ... he’s going to kill somebody within that ‘kill zone’. Joel F[.] was one of them. There were others there as well .... [¶] ... [¶] He didn’t specifically go for Joel F[.] He was just one in that ‘kill zone’ and he intended to kill someone in there ....”

In his closing argument, the prosecutor pressed the same theme:

“There’s no evidence [appellant] even knew Joel F[.] by name. He was just one of that group that was in that ‘kill zone’. Okay? And that’s why he fired. He was, Joel F[.] was in that zone and so were others....”

Neither would it be reasonable to think that the jury, despite the prosecutor’s argument, might have reached the conclusion that appellant did specifically intend to kill Joel F. when he fired a shot into the group of which Joel was a part. As noted by our Supreme Court in *People v. Guiton* (1993) 4 Cal.4th 1116, appellate courts must

“proceed on the assumption that [juries] reasonably, conscientiously, and impartially apply[] the standards that govern the[ir] decision.’ (*Strickland v. Washington* (1984) 466 U.S. 668, 695.) Thus, if there are two possible grounds for the jury’s verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground.” (*Id.* at p. 1127.)

We make that assumption here and conclude the jury did not convict based on the theory that appellant specifically intended to kill Joel F.

For similar reasons, we also reject the proposition that the jury convicted appellant on the theory embodied in the kill zone paragraph of CALCRIM No. 600,<sup>2</sup> even as the instruction was modified here.<sup>3</sup> That theory posits that a defendant may be found to have had the intent to kill multiple victims when, in an effort to kill a targeted victim, he or she employs means that create a zone of danger to all persons within the zone. (*People v. Bland* (2002) 28 Cal.4th 313, 330.) As explained in *Stone II*, “[t]hat theory addresses the question of whether a defendant charged with the murder or attempted murder of an

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<sup>2</sup>The kill zone paragraph of Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 600 reads in pertinent part: “A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or ‘kill zone.’ In order to convict the defendant of the attempted murder of \_\_\_\_\_ <insert name of victim charged in attempted murder count[s] on concurrent –intent theory>, the People must prove that the defendant not only intended to kill \_\_\_\_\_ <insert name of primary target alleged> but also either intended to kill \_\_\_\_\_ <insert name of victim charged in attempted murder count[s] on concurrent-intent theory>, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill \_\_\_\_\_ <insert name of victim charged in attempted murder count[s] on concurrent-intent theory> or intended to kill \_\_\_\_\_ <insert name of primary target alleged> by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of \_\_\_\_\_ <insert name of victim charged in attempted murder count[s] on concurrent-intent theory>.”

<sup>3</sup>The instruction given at trial reads in pertinent part: “A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or ... ‘kill zone’ .... [¶] In order to convict [appellant] of the attempted murder of [Joel F.], the People must prove either that [appellant] intended to kill [Joel F.], or that he not only intended to kill another human being, but also that he intended to kill anyone within the ‘kill zone’, and that [Joel F.] was in the zone of harm or ‘kill zone’ at the time of the shot. [¶] If you have a reasonable doubt whether [appellant] intended to kill [Joel F.] or intended to kill another by harming everyone in the ‘kill zone,’ or whether [Joel F.] was in the ‘kill zone,’ then you must find [appellant] not guilty of the attempted murder of [Joel F.]”

intended target can *also* be convicted of attempting to murder other, nontargeted, persons.” (*Stone II, supra*, 46 Cal.4th at p. 138.)

As we noted in our original opinion in this matter, the kill zone instruction contains an ambiguity in that it refers in one sentence to the accused’s intent to kill “anyone within the kill zone” and in the next sentence to harming “everyone in the kill zone.” If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury understood and applied the instruction in the asserted manner. (*People v. Hernandez* (2003) 111 Cal.App.4th 582, 589; see also *People v. Bland, supra*, 28 Cal.4th at p. 333.) One of the ways in which we can make that determination is to examine the prosecutor’s argument to the jury. (*People v. Bland, supra*, at p. 333; see also *People v. Guiton, supra*, 4 Cal.4th at p. 1130; *People v. Brown* (1988) 45 Cal.3d 1247, 1256.) We have already quoted at length from the prosecutor’s argument here. We also have reviewed the entire record. Suffice it to say that there was never any suggestion to this jury that it should or could convict appellant on the theory that, in an effort to kill a targeted victim, he employed a means that created a zone of harm for all persons within it, including the targeted victim. The theory simply did not apply to the facts, and it would be unreasonable for us to assume the jury tried to make it fit.

Rather, it is clear now and has always been clear that the jury convicted appellant on the theory upon which the prosecution relied: that appellant fired a single bullet into a group of people, intending to kill any one of them. The jury’s verdict clearly demonstrates its finding that appellant did intend to kill when he fired that single shot. The question presented now is whether that finding can be allowed to stand or, instead, must fall because it was attached to the erroneous second step of the prosecutor’s theory—that a finding that appellant intended to kill a person, any person, from the group, was sufficient to support a conviction for the attempted murder of Joel F. We agree with the Supreme Court that the answer depends upon principles relating to variance between the pleading and proof; for, it seems clear to us, if the prosecutor could have moved, at the end of trial but before the jury’s verdict, to amend the information to

substitute “a human being” as the victim, deleting Joel F., then appellant suffers no prejudice should we in effect allow such an amendment now.

We proceed to consider that question.<sup>4</sup>

## **2. Variance Between Pleading and Proof at Trial**

In remanding this case, the Supreme Court found it “problematic” that the information alleged that appellant intended to kill an identified victim, Joel F., but the prosecution “ultimately could not prove that [appellant] targeted a specific person rather than simply someone within the group.” (*Stone II, supra*, 46 Cal.4th at p. 141.) The court ordered us to consider any issues arising from the variance between the allegation of the information that appellant intended to kill Joel F. and the proof at trial that he “intended to kill someone although not specifically Joel F. (See ... § 956.)” (*Id.* at p. 142.)

Appellant now contends that to ignore the variance between the pleading and proof, by allowing his conviction on count 1 to stand, would in effect deprive him of constitutionally adequate notice of the charges and the opportunity to prepare his defense. Specifically, appellant contends that, based on the information, he was called upon only to defend against a charge that he attempted to kill Joel F., and the expansion of the

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<sup>4</sup>First, however, we must address two additional contentions made by appellant (though without separate headings in his opening brief). First, he argues his conviction must be reversed because, although the evidence supports the theory that appellant intended to kill when he fired into the group, it also would support a theory of implied malice in that he did not intend to kill but just to frighten. From this, appellant concludes that a properly instructed jury could have returned a verdict in his favor. But it was clear from the instructions given and the arguments of both counsel for the defense and the prosecutor, that the issue was whether appellant did or did not specifically intend to kill. The jury found that he did.

Second, appellant asserts there was reversible error because the last phrase in the kill zone instruction refers to having a reasonable doubt about whether appellant intended to kill by “harming” everyone in the kill zone. We first refer appellant to footnote 3 of the Supreme Court’s opinion in *Stone II*, where it simply says “it would be better for the instruction to use the word ‘kill’ consistently rather than the word ‘harm.’” (*Stone II, supra*, 46 Cal.4th at p. 138, fn. 3.) We read this as an implicit rejection of the asserted error. Further, we note that the allegedly offending portion of the instruction was necessarily harmless because, as we have already concluded, the kill zone theory of guilt simply did not apply to the evidence presented.

possible victims to include anyone within the targeted group was a material variance and, therefore, prejudicial. We disagree.<sup>5</sup>

The due process guarantees of the state and federal Constitutions require that a criminal defendant “receive notice of the charges adequate to give a meaningful opportunity to defend against them.” (*People v. Seaton* (2001) 26 Cal.4th 598, 640.) “No accusatory pleading is insufficient, [however,] nor can the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.” (§ 960.) Section 956, cited to us in the Supreme Court’s remand order, is as follows:

“When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, *an erroneous allegation as to the person injured, or intended to be injured*, or of the place where the offense was committed, or of the property involved in its commission, is not material.” (Italics added.)

If the information charges the offense in such manner that the defendant is apprised of the act with which he or she is charged with sufficient certainty to enable the defendant to make a defense thereto, if the defendant is not misled by any statement contained in the information, and the transaction is so identified that the defendant, by a proper plea, may protect himself or herself against another prosecution for the same offense, it must be held that the allegations are sufficient to sustain the conviction when an attack is made upon the ground of variance. (*People v. Silverman* (1939) 33 Cal.App.2d 1, 4-5.)

In order to obtain reversal of a conviction on the ground there was a variance between the allegations of an information and the proof at trial, the variance must be

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<sup>5</sup>When a defendant challenges the adequacy of notice in the charging document, he must object at trial or the issue will be deemed waived. (*People v. Bright* (1996) 12 Cal.4th 652, 671, overruled on another ground in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6; *People v. Ramirez* (2003) 109 Cal.App.4th 992, 997.) But we agree with both parties that, given the particular circumstances of this case, we must address the issue on the merits.

“material.” (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 191, p. 398.)

“[A]n information plays a limited but important role: it tells a defendant what *kinds* of offenses he is charged with (usually by reference to a statute violated), and it states the *number* of offenses (convictions) that can result from the prosecution. But the time, place and circumstances of charged offenses are left to the preliminary hearing transcript; it is the touchstone of due process notice to a defendant.” (*People v. Gordon* (1985) 165 Cal.App.3d 839, 870 (conc. opn. of Sims, J.), disapproved on other grounds in *People v. Frazer* (1999) 21 Cal.4th 737, 765, overruled on another ground in *Stogner v. California* (2003) 539 U.S. 607, 610, 632-633.)

“The test of the materiality of a variance [between the accusatory pleading and the proof] is whether the indictment or information so fully and correctly informs the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense.” (*People v. LaMarr* (1942) 20 Cal.2d 705, 711.)

For instance, it has been held that, provided the information correctly alleges the county in which the offense occurred, a mistake in the address of the site of a burglary is an immaterial variance that does not require reversal of a conviction. (*People v. Williams* (1945) 27 Cal.2d 220, 226.) And it has frequently been held that convictions may be affirmed notwithstanding that the information stated erroneous names as owners of stolen property. (*People v. Larrabee* (1931) 113 Cal.App. 745, 747; *People v. Cloud* (1929) 100 Cal.App. 792, 794; *People v. Nunley* (1904) 142 Cal. 105, 107-109; *People v. Leong Quong* (1882) 60 Cal. 107, 108.)

In *People v. Powell* (1974) 40 Cal.App.3d 107, the information charged the defendants with murdering a Los Angeles police officer in Los Angeles County. But the evidence at trial showed that the defendants kidnapped the officer in Los Angeles and drove him to Kern County, where they murdered him. (*Id.* at pp. 116-118.) The appellate court rejected the defendants’ claim that the variance between the evidence and the information prejudiced them. The court found the claim “specious,” noting that the

defendants had previously been tried for the same offense and had the benefit of a preliminary hearing transcript and a full trial transcript. “In no way could they or their counsel have been misled as to the nature of the evidence that the prosecution would offer.” (*Id.* at pp. 123-124.)

And in *In re Michael D.* (2002) 100 Cal.App.4th 115, a minor pointed a replica firearm at a student at an elementary school playground. An office manager saw the minor threatening the student and alerted staff and the police. (*Id.* at pp. 119-120.) The petition alleged the minor violated section 417.4 by brandishing a replica firearm, causing the office manager, not the student, to be in fear. Although the minor raised the issue as one of insufficiency of the evidence, the court addressed it as a variance between the petition and the proof and found it to be inconsequential. (*In re Michael D.*, at p. 128.)

Here, the time, place, and circumstances of the charged offense appear in the transcript of the preliminary hearing. At that hearing, Officer Pescatore testified that, after observing some gang members congregating at a street carnival parking lot, he observed a truck drive towards the group of Nortenos, slow down, “and at that time I saw an arm come out the [passenger side] window and I heard and saw a gunshot.” When asked where the weapon was being pointed, Pescatore said, “To me it appeared the weapon was being pointed at the group of Nortenos.” He estimated the truck was four feet from the Norteno group at that point. The truck was subsequently stopped and appellant was in the front right passenger-side seat.

Investigator Rossi testified at the preliminary hearing that he spoke with “some of the victims or the Nortenos that were shot at,” specifically “one of those individuals Joel F[.]” Joel F. denied being a gang member but acknowledged some of the people he was with were Nortenos. Joel F. told Investigator Rossi that the group in the truck and the people in his group were “mad-dogging” each other and someone in the truck shouted “X3” and “threw up three fingers,” both gang identifications. The truck then drove by the group slowly and the right front passenger held out a handgun in the direction of the

group “aimed slightly over their heads” but low enough that somebody in the group could have been shot. Joel F. feared for his safety and hid behind a parked car.

Investigator Rossi also testified that he spoke to Jamal, who told him he saw the right front passenger raise his right hand and point a gun out the window in the direction of the group. Jamal hid behind a car and then heard a shot.

At the conclusion of the preliminary hearing, counsel for appellant asked to address the court on the issue of the attempted murder:

“It’s a very serious charge and I think it’s going to take more than just an individual saying, and I quote, ‘He pointed the gun in our direction, he thought it was a little bit high but it may have been—it could have possibly shot someone in our group.’ [¶] I think that’s an assault with a deadly weapon, I do not think that’s specific intent to commit murder on an individual.”

The prosecutor argued defense counsel’s concern was an issue for trial.

Thus, the information notified appellant that he was charged with a single count of attempted murder. The testimony at the preliminary hearing described “with sufficient certainty” that the offense was committed on October 21, 2005, while appellant was seated in a pickup truck and fired a single shot from a handgun at a group of Nortenos together in a grassy area of the parking lot. After this, the evidence at trial presented no surprises.

At least as far as we are aware, appellant registered no objection, at trial or otherwise, to the prosecutor’s theory of guilt. That is, defense counsel gave no indication that he was taken by surprise by that theory of guilt. Defense counsel simply attempted to work around that theory. Appellant presented no defense that depended upon the identity of Joel F. as the intended victim. Appellant’s defense was that he was not the shooter, and that, if he was, he aimed above the heads of the entire group and was not “trying to shoot anybody.” Defense counsel specifically stated that the prosecution had failed to prove not only that appellant intended to kill Joel F. but also that appellant intended to kill anyone. “[I]f he intended to kill Joel [F.], according to Joel [F.]’s

statement, if he intended to kill anybody, if he intended to shoot anybody he would have. Didn't happen. It didn't happen.”

The issue in appellant's trial was not who he intended to kill but whether he intended to kill. We perceive no possibility of prejudice to appellant in the identification of the victim as Joel F. and conclude that any error was harmless.

### **3. Corrections to the Abstract of Judgment Are Necessary**

Although the parties do not so argue, we note errors on the abstract of judgment that need correcting. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate courts may order abstracts of judgment corrected that do not accurately reflect oral judgments of sentencing courts].)

First, in item No. 1 of the abstract of judgment (form CR-292), counts 3, 4, and 5, although correctly designated as violations of section 136.1, subdivision (a)(2), are each incorrectly identified as a violation of “assault with firearm” instead of “attempt to dissuade a witness.” We order item No. 1, counts 3, 4, and 5 so corrected.

Second, in item No. 2, the “15 to life” gang enhancement imposed on count 1 was imposed pursuant to section 186.22, subdivision (b)(5), not “(B)(1)” as recorded, although it was charged under subdivision (b)(1). We order item No. 2 corrected to reflect section 186.22, subdivision (b)(1) and (b)(5).

Third, item No. 6c states that appellant was sentenced to “7 years to Life on counts 1, 3, 4, & 5,” when he was actually sentenced to 15 years to life on count 1 and seven years to life on the remaining counts. We order item No. 6c corrected to reflect 15 years to life on count 1 and seven years to life on counts 3, 4, and 5.

Fourth, item No. 11 states, inter alia, “PLUS 10 YEARS FOR A VIOLATION OF 12022.53(b)PC–STRICKEN.” According to the sentencing transcript, appellant was sentenced to a determinate term of 10 years for the section 12022.53 enhancement and it was the enhancement “under Section 12022.5 [which] is stricken.” We order item No. 11 corrected to reflect 10 years for a violation of section 12022.53, subdivision (b) and that the enhancement under section 12022.5 is stricken.

## DISPOSITION

The court is directed to correct abstract of judgment form CR-292 to reflect the following: to properly designate counts 3, 4, and 5, each, as “attempt to dissuade a witness”; to accurately reflect that the 15 years to life gang enhancement was imposed pursuant to section 186.22, subdivision (b)(1) and (b)(5); to accurately reflect that count 1 carries with it a 15 years to life sentence and that counts 3, 4, and 5 each carries with it a seven years to life sentence; and to accurately reflect that a 10-year determinate term is imposed pursuant to section 12022.53, subdivision (b) and that the enhancement imposed pursuant to section 12022.5 is stricken. The court is directed to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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GOMES, Acting P.J.

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KANE, J.